

Below is a Memorandum Decision of
the Court.




Mary Jo Heston
U.S. Bankruptcy Judge

(Dated as of Entered on Docket date above)

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF WASHINGTON AT TACOMA

In re:

VANDEVCO LIMITED and ORLAND
LTD.,

Debtors.

Case Nos:

20-42710-MJH (Lead Case)

20-42711-MJH (Jointly administered
under Case No. 20-42710-MJH)

**MEMORANDUM DECISION ON
DISCOVERY SANCTIONS**

This matter came before the Court on July 18, 2024, on the Court's Interim Order Awarding Sanctions and Scheduling Hearing and Additional Briefing ("Interim Order Awarding Sanctions"). ECF No. 1364. The Court, having considered the arguments of counsel and the record as set forth below, states its opinion as follows:

I. PROCEDURAL HISTORY

This case has an extensive background involving numerous discovery disputes, many that arose prior to the bankruptcy filings. Relevant to the matter currently before the Court, on June 24, 2021, Cerner Middle East Limited ("Cerner") issued its First Set of

1 Requests for Production (“First RFPs”) to Vandevco Limited and Orland Ltd. (collectively
2 “Debtors”). Garrett S. Garfield (“Garfield”) Decl. Ex. 1, ECF No. 1449-1. These included a
3 request for “all documents related to communications between owners, directors, officers,
4 or employees of Belbadi, on the one hand, and owners, directors, officers, or employees of
5 Orland, Vandevco, or any of the Van Subs.” *Id.* at Req. for Prod. No. 42.

6 On August 3, 2021, Cerner filed Creditor Cerner’s (A) Motion to Compel Belbadi
7 Enterprises, LLC (“Belbadi”) to Turnover Debtors’ Books and Records and (B) Motion to
8 Compel Discovery from Belbadi (“Motions to Compel”). ECF No. 295. The Motions to
9 Compel was set for hearing on August 20, 2021.

10 During the August 20, 2021 hearing on Cerner’s Motions to Compel, the Court directed
11 Cerner to submit a second request for production to Debtors (“Second RFPs”). Tr. of August
12 20, 2021 Hr’g 28:9-13, ECF No. 349. Cerner sent the Second RFPs to the Debtors on August
13 24, 2021. Garfield Decl. Ex. 3, ECF No. 1449-3. In the Debtors’ response on August 26,
14 2021, the Debtors claimed to have “produced all responsive documents in their possession,
15 custody or control.” Debtors’ Resp. to Second RFPs 1:5-7, ECF No. 346.

16 On October 26, 2021, Cerner filed a Motion to (A) Compel Debtors to Seek Turnover of
17 their Books and Records, or in the Alternative, (B) Appoint a Chapter 11 Trustee and a
18 Motion to Compel Discovery from Belbadi. ECF Nos. 459 and 460. On March 29, 2022,
19 Cerner filed a Request for Relief in connection with these two motions and noted the
20 matters for hearing on April 19, 2022. ECF No. 661.

21 After the April 19, 2022 hearing, the Court entered an Order on Cerner’s Motions to
22 Compel (ECF No. 661) (“Order on Motions to Compel”). ECF No. 691. The Court

23 **ORDERED** that at the evidentiary hearing on the Debtors’ Objection to
24 Cerner’s Claim, the Debtors are prohibited from presenting *any* testimonial or
25 documentary evidence that is (1) based on electronically stored information,
26 (2) related to the Debtors’ assets and liabilities, capital structure, and
businesses (3) previously under their control, (4) that they failed to preserve,
and (5) to which Cerner does not have access; it is further

27 **ORDERED** that if, prior to the evidentiary hearing and no later than 30 days
from the date of this Order, the Debtors or Belbadi provide Cerner with such

1 spoliated ESI related to the Debtors' assets and liabilities, businesses, and
2 capital structure in Belbadi's possession, the Debtors will not be prohibited
3 from presenting such testimonial or documentary evidence as set forth above.
4

5 *Id.* at 16:8-18.

6 On June 6, 2022, the Court entered an Order Granting Cerner's Petition for Attorneys'
7 Fees and Costs Award Pursuant to Court Order Granting Sanctions [Dkt. 691]. ECF No.
8 743. In this sanctions order ("First Petition Sanctions Order"), the Court ordered the
9 Debtors to pay \$114,877.00 for Cerner's reasonable attorneys' fee and costs. *Id.* at 2:6-8.

10 With the parties' consent, the initial 30-day deadline in the Order on Motions to Compel
11 was continued on numerous occasions to allow Debtors to gather and produce electronically
12 stored information ("ESI") in the United Arab Emirates ("UAE"). This resulted in eight
13 editions of the Order Modifying Order on Motions to Compel: Second Order Modifying
14 Order on Motions to Compel entered on June 13, 2022, at ECF No. 747; Third Order
15 Modifying Order on Motions to Compel entered on July 8, 2022, at ECF No. 769; Fourth
16 Order Modifying Order on Motions to Compel entered August 26, 2022, at ECF No. 793;
17 Fifth Order Modifying Order on Motions to Compel entered on November 22, 2022, at ECF
18 No. 835; Sixth Order Modifying Order on Motions to Compel entered on December 2, 2022,
19 at ECF No. 854; Seventh Order Modifying Order on Motions to Compel entered on February
20 6, 2023, at ECF No. 893; and Eighth Order Modifying Order on Motions to Compel entered
21 on April 14, 2023, at ECF No. 937. In the Eighth Order Modifying, the Court extended the
deadline for the Debtors to produce the ESI to May 1, 2023. No further orders extending
the deadline were entered thereafter.

22 On May 10, 2023, the Debtors, through their e-discovery vendor Kroll, produced
23 approximately 38,000 documents gathered from Belbadi in the UAE. Garfield Decl. ¶2,
24 ECF No. 1326. At a status conference held July 11, 2023, Debtors' counsel explained that
25 there were a "few minor issues that we're working through" and that they expected some
26 follow-up over the next couple of weeks, but did not think "it will be all that material." Tr.
27 of July 11, 2023 Hr'g 5:23-6:9, ECF No. 1010.

1 Cerner then sent the Debtors a deficiency letter dated July 31, 2023 (“Deficiency
2 Letter”), indicating that the production appeared to be missing (1) certain attachments to
3 emails, and (2) WhatsApp messages, including communication among Ahmed Saeed
4 Mohammad Al Badi Al Dhaheri (“Dhaheri”), Ziad Elhindi (“Elhindi”) and other key
5 individuals. Garfield Decl., Ex. 4, ECF No. 1449-4.

6 The Debtors represent that following receipt of the Deficiency Letter, they continued to
7 work with Kroll on the family-level production.¹ Debtors’ Resp. 9:6-13, ECF No. 1481.
8 Additionally, they had written and telephonic communication with Cerner’s counsel
9 regarding the review and production of WhatsApp messages. Phillip J. Haberthur
10 (“Haberthur”) Decl. 2:15-24, ECF No. 1481-1; Exs. B and C, ECF No. 1481-2.

11 A supplemental production of an additional 125 pages was made on August 8, 2023.
12 According to Cerner, it did not object to the May 10 or August 8, 2023 productions as
13 untimely in an effort to accommodate the inherent difficulties in a major production of
14 electronic evidence. Cerner’s Req. for Disc. Sanctions 5:1-3 n.2, ECF No. 1325. Additionally,
15 Cerner represents that there was no indication at that time that the production was not
16 substantially completed. *Id.* at 2:3-4.

17 On November 17, 2023, Cerner issued its Third Set of Requests for Production to the
18 Debtors (“Third RFPs”). The Third RFPs included requests for communication between
19 Elhindi, Nawzad Othman (“Othman”), and others, concerning Debtors’ litigation with
20 Cerner. Garfield Decl. Ex. 5, Third RFPs Nos. 4 and 9, ECF No. 1449-5.

21 On December 5, 2023, Cerner’s counsel requested an update on the status of the
22 WhatsApp message review, indicating they wanted to review the messages prior to the
23 depositions of Elhindi and Othman to be held later in December 2023. Haberthur Decl. Ex.
24 C, ECF No. 1481-2. The Debtors represent in Debtors’ Response to Cerner’s Supplemental
25

26 ¹ Although not specifically defined, the parties refer to “family members” as all records associated with
27 a particular documents (i.e. an email and the attachment). See, e.g., Debtors’ Memo for Hearing On: 1) Whether to Appoint Chapter 11 Trustee or Scheduled Hearing Regarding Willamette and Belbadi 2) Sanctions 3:10-12, ECF No. 1354; Garfield Decl., Ex. 4, ECF No. 1449-4.

1 Request for Discovery Sanctions (“Debtors’ Response”) that they conferred with Cerner’s
2 counsel a few days after obtaining an update from Kroll. Debtors’ Resp. 9:6-13, ECF No.
3 1481. There is nothing in the record indicating what information was conveyed by Debtors
4 to Cerner’s counsel at that time.

5 Cerner represents it worked to review the materials produced from Belbadi. Cerner
6 also proceeded with the litigation by scheduling and conducting the depositions of the
7 Debtors’ principals: Elhindi on December 18, 2023, and Othman on December 19, 2023.

8 On January 19, 2024, with the parties’ input and concurrence, the Court entered a
9 Notice of Evidentiary Hearing and Order Setting Deadlines scheduling a five-day
10 evidentiary hearing on Debtor’s supplemental objection to Cerner’s Claim Number 1 to
11 commence on April 29, 2024. ECF No. 1211. The non-expert and expert discovery cutoff
12 date was March 8, 2024. On March 5, 2024, the Court entered a Stipulated Order Amending
13 Order Setting Trial Deadlines, extending the non-expert discovery cutoff date and expert
14 disclosures to March 13, 2024. ECF No. 1307.

15 On March 6, 2024, Garfield and Debtors’ counsel had a telephone conversation, during
16 which Debtors’ counsel informed Garfield that further discovery production was
17 forthcoming and that it likely would consist of the WhatsApp messages. Garfield Decl. 1:25-
18 2:3, ECF No. 1335. Garfield was not aware that the production would contain tens of
19 thousands of pages of documents. *Id.* at 2:6-7.

20 On March 8, 2024, the Debtors made a supplemental production of approximately
21 30,000 pages of documents. Garfield Decl. ¶5, ECF No. 1326. On March 11, 2024, Cerner
22 filed a letter from Warren E. Gluck (“Gluck”) requesting an emergency discovery conference
23 in connection with this document production. ECF No. 1317. On March 12, 2024, the Court
24 entered an Order Setting Status Conference for March 20, 2024. ECF No. 1323.

25 On or about March 13, 2024, the Debtors made another production of approximately
26 30,000 pages of documents. Garfield Decl. ¶7, ECF No. 1326.

27

1 On March 18, 2024, Cerner filed a Request for Discovery Sanctions (Submitted in
2 Advance of Emergency Hearing on March 20, 2024) ("Discovery Sanctions Motion"). ECF
3 No. 1325. At the status conference held on March 20, 2024, the Court struck the April 29,
4 2024 evidentiary hearing and continued the hearing on Cerner's Discovery Sanctions
5 Motion to April 10, 2024.

6 Both parties filed briefs in advance of the April 10, 2024 hearing. See Cerner's brief at
7 ECF No. 1351, including Garfield's declaration in support at ECF No. 1352, and Debtors'
8 brief at ECF No. 1354. At the April 10 hearing, the Court orally ruled that it was going to
9 impose sanctions against the Debtors and Debtors' counsel due to the belated discovery
10 productions. The Court stated,

11 So at this point what I'm going to order is that the, against both the debtor and
12 debtors' counsel is that they pay for any and all costs and fees associated with
13 the hearings related to this motion, any briefing on this issue, any fees and
14 costs incurred by Cerner in relation to review of the additional documents
15 made necessary by both the manner and extent of the belated production
16 through today's hearing.

17 What I want to see before I determine whether further sanctions are warranted
18 is the 150 documents that have been identified and I'll give Cerner an
19 opportunity to produce any other documents that they deem should have been
20 produced and that are relevant earlier than that, earlier than the last
21 productions that caused the current pending motion for sanctions.

22 Tr. of April 10, 2024 Hr'g 20:11-24, ECF No. 1362.

23 On April 17, 2024, the Court entered the Interim Order Awarding Sanctions. ECF No.
24 1364. In the Interim Order Awarding Sanctions, the Court awarded Cerner sanctions
25 against Debtors and Debtors' counsel for discovery violations as alleged in Cerner's
Discovery Sanctions Motion, and ordered the Debtors and Debtors' counsel

26 to pay any and all of Cerner's costs and fees associated with the hearing related
27 to the Discovery Sanctions Motion, including any briefing on this issue, and
any fees and costs incurred by Cerner in relation to review of the additional
documents made necessary by both the manner and extent of the belated
production, through the April 10, 2024 hearing.

Interim Order Awarding Sanctions 2:10-14, ECF No. 1364. The Court further ordered that
Debtors' counsel will not be compensated by funds of the bankruptcy estate for any time

1 or effort expended in relation to the Discovery Sanctions Motion or further hearing on this
2 issue.” *Id.* at 2:18-20.

3 The Debtors were ordered to file with the Court, the approximately 150 documents
4 identified by Debtors’ counsel on the record that were not previously produced, including
5 any items from the cell phones, WhatsApp, and email records of Othman and Elhindi by
6 April 19, 2024. *Id.* at 2:21-24. The Court gave Cerner an opportunity to file a further
7 response and set a status conference for May 6, 2024. *Id.*

8 The Debtors submitted their Amended Response to Interim Order Awarding Sanctions
9 on April 23, 2024. ECF No. 1374. Exhibit B to the Debtors’ submission—comprising cell
10 phone and email records for Othman and Elhindi—was not filed at that time, however, due
11 to technical issues with the court filing system caused by the large volume of the exhibit.
12 Following a further status hearing held April 25, 2024, the Exhibit B records were provided
13 by the Debtors to the Court in PDF format on thumb drives, as indicated in a docket text
14 at ECF No. 1388 entered on April 29, 2024. The Exhibit B materials include two files: (1)
15 a .pdf file titled “Exhibit B (excluding exact Lexbe duplicates)”; and (2) a .pdf file titled
16 “Exhibit B.”

17 Cerner timely filed a response on April 30, 2024 (“Cerner’s Response”), supported by
18 the declaration of Andrew J. Simpson (“Simpson”). ECF Nos. 1384 and 1385. Cerner also
19 filed a Second Petition for Attorneys’ Fees and Costs Award Pursuant to Court Order
20 Granting Sanctions [ECF No. 1364] (“Second Petition”) and the declaration of Garfield in
21 support of the Second Petition. ECF Nos. 1386 and 1387. The Second Petition contains an
22 itemization of work undertaken by Cerner’s counsel in connection with the Discovery
23 Sanctions Motion between March 8 and April 10, 2024. The fees and costs requested in the
24 Second Petition total \$139,587.75. Second Petition 9:10, ECF No. 1386.

25 Following the status conference held on May 6, 2024, the Court entered an Order
26 Scheduling Additional Briefing (“Additional Briefing Order”) on the Discovery Sanctions
27 Motion. ECF No. 1424. Cerner was given until May 24, 2024, to file any briefing concerning

1 the legal basis for additional sanctions under Fed. R. Civ. P. 37, together with the evidence
2 to support such additional sanctions and in support of additional costs and fees incurred
3 through May 6, 2024. The Debtors were given until June 7, 2024, to file any briefing and
4 evidence in response. The Additional Briefing Order further provided that the Court would
5 contact the parties if it determined that a further hearing was necessary.

6 On May 24, 2024, Cerner timely filed its Supplemental Request for Discovery Sanctions
7 Pursuant to May 7, 2024 Order (“Supplemental Request”). ECF No. 1448. Cerner seeks the
8 following additional sanctions: (1) a further award of fees and costs incurred from April 10
9 to May 6, 2024, to be assessed under Fed. R. Civ. P. 37(b)(2)(C); (2) a prospective fee award
10 under Fed. R. Civ. P. 37(b)(2)(C) of any further fees and costs that may be incurred as a
11 result of the Debtors’ discovery violations; and (3) evidentiary sanctions under Fed. R. Civ.
12 P. 37(b)(2)(A)(ii). Garfield filed a declaration in support of the Supplemental Request. ECF
13 No. 1449.

14 On May 24, 2024, Cerner also filed a Third Petition for Attorneys’ Fees and Costs
15 Award Pursuant to Court Orders Granting Sanctions (“Third Petition”), supported by the
16 declaration of Elliot A. Magruder (“Magruder”). ECF Nos. 1450 and 1451. The Third
17 Petition seeks fees and costs of \$55,165.50, for work undertaken by Cerner’s counsel in
18 connection with the Discovery Sanctions Motion for the period between April 11 and May
19 6, 2024. Third Petition 5:13, ECF No. 1450.

20 Debtors’ Response was filed on June 7, 2024, supported by Haberthur’s declaration.
21 ECF Nos. 1481 and 1481-1.

22 After a continued status conference on July 9, 2024, the Court scheduled oral argument
23 on the Discovery Sanctions Motion for July 18, 2024. During the July 18, 2024 hearing, in
24 response to the Debtors’ objection regarding block billing by Cerner’s counsel, the Court
25 directed Cerner’s counsel to submit for *in camera* review an itemized list of time entries
26 that correspond to the fees requested by Cerner in its Third Petition. Tr. of July 18, 2024
27 Hr’g 21:1-4, ECF No. 1518. Also at the hearing, the Court recognized that based on the

1 Debtors' pleadings, it appeared the Debtors did not dispute Cerner's request for \$89,153.40
2 of the total attorney fees requested through May 6, 2024. *Id.* 35:5-7. At the end of the
3 hearing, the Court took the matter under advisement.

4 On July 23, 2023, Debtors' counsel filed a letter to the Court clarifying that "while the
5 Debtors object to specific time *entries* totaling \$105,599.75 (leaving \$89,153.50 in
6 'unobjectionable entries'), the Debtors further dispute that Cerner is entitled to recover the
7 entirety of the \$89,153.50 of requested fees." ECF No. 1522. The letter further explains that
8 while Debtors "do not dispute that Cerner is entitled to 'appropriate compensation for [its]
9 initial motion practice' following the March 2024 productions," this should be no more than
10 "appropriate compensation for Cerner's initial motion practice on this issue." *Id.*

11 On July 23, 2024, Garfield emailed the Court a cover letter and an itemized list of time
12 entries underlying the Third Petition for *in camera* review. This itemized list includes a
13 description of the legal services, time spent, timekeeper names, hourly rates, and total fees
14 billed. Debtors' attorneys were copied on the cover letter but not the enclosure due to
15 concerns about privilege and work product.

16 II. DISCUSSION

17 Fed. R. Civ. P. 37(b)(2)(A), made applicable to this proceeding pursuant to Fed. R.
18 Bankr. Proc. 7037² and 9014(c), grants the Court authority to impose sanctions for failure
19 to obey a discovery order. Such sanctions may include "prohibiting the disobedient party
20 from supporting or opposing designated claims or defenses, or from introducing designated
21 matters in evidence." Fed. Rule Civ. P. 37(b)(2)(A)(ii). Sanctions may be imposed for even
22 negligent failure to provide discovery. *Fjelstad v. Am. Honda Motor Co.*, 762 F.2d 1334,
23 1343 (9th Cir. 1985) (citing *Lew v. Kona Hosp.*, 754 F.2d 1420, 1427 (9th Cir. 1985)).

24
25
26 ² Unless otherwise indicated, all chapter, section, and rule references are to the Federal Bankruptcy
Code, 11 U.S.C. § 101–1532, and to the Federal Rules of Bankruptcy Procedure, 1001–9037.
27

1 Fed. R. Civ. P. 37(b)(2)(C) further provides that instead of or in connection with a
2 party's failure to comply with a discovery order:

3 the court must order the disobedient party, the attorney advising that party,
4 or both to pay the reasonable expenses, including attorney's fees, caused by the
failure, unless the failure was substantially justified or other circumstances
make an award of expenses unjust.
5

6 Fed. R. Civ. P. 37(b)(2)(C).

7 Sanctions under Fed. R. Civ. P. 37(b)(2) are limited by two guiding principles: “[f]irst,
8 any sanction must be ‘just’; second, the sanction must be specifically related to the
9 particular ‘claim’ which was at issue in the order to provide discovery.” *Navellier v.*
10 *Sletten*, 262 F.3d 923, 947 (9th Cir. 2001) (quoting *Ins. Corp. of Ireland, Ltd., v. Compagnie*
11 *des Bauxites de Guinee*, 456 U.S. 694, 707 (1982)).

12 **A. Monetary Sanctions Under Fed. R. Civ. P. 37(b)(2)(C).**

13 ***1. Attorneys' Fees and Costs Already Incurred.***

14 Before the Court are two separate petitions for fees already incurred: (1) the Second
15 Petition seeking fees for work undertaken between March 8 and April 10, 2024, and (2) the
16 Third Petition seeking fees for work performed between April 11 and May 6, 2024.

17 ***a. Second Petition.***

18 The Court has already determined that the Debtors failed to comply with the Court's
19 Order on Motions to Compel and that Cerner is entitled to an award of fees and costs
20 against Debtors and Debtors' counsel through the April 10, 2024 hearing pursuant to Fed.
21 R. Civ. P. 37(b)(2)(C). See Interim Order Awarding Sanctions 2:7-14, ECF No. 1364. Thus,
22 in regards to the Second Petition, the issue is not whether a fee award is justified, but
23 whether the requested amount is reasonable.

24 Cerner timely filed the Second Petition on April 30, 2024, which contains an itemization
25 of work undertaken by Cerner's counsel in connection with the Discovery Sanctions Motion
26 between March 8 and April 10, 2024, and requests total fees and costs of \$139,587.75.
27 Second Petition 9:10, ECF No. 1386.

1 Both in their response and at the various hearings on this issue, the Debtors and
2 Debtors' counsel accepted responsibility for the belated discovery and conceded that a fee
3 award, of some amount, is warranted. *See, e.g.*, Debtors' Resp. 2:19-24, ECF No. 1481; July
4 23, 2024 Letter, ECF No. 1522. The Debtors argue, however, that the fee request should be
5 limited, as the amount requested is not "reasonable or appropriate." Debtors' Resp. 14:14,
6 ECF No. 1481. Specifically, the Debtors argue that \$37,343.25 in lumped entries and
7 \$13,091³ in deposition and trial preparation fees should be disallowed. Debtors' Resp. 18:1-
8 7, ECF No. 1481.

9 The burden is on the fee applicant to document the hours reasonably expended on a
10 matter and to "justify the reasonableness of the requested rate[s]." *Blum v. Stenson*, 465
11 U.S. 886, 895 n.11 (1984). The Ninth Circuit Court of Appeals ("Ninth Circuit") has adopted
12 the "lodestar" approach for assessing an award of attorney's fees. The "lodestar" is
13 calculated by multiplying the number of hours the prevailing party reasonably expended
14 on the litigation by a reasonable hourly rate. *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d
15 973, 978 (9th Cir. 2008). Courts in the Ninth Circuit have applied the "lodestar" method to
16 an award of fees under Rule 37. *See, e.g.*, *Raygoza v. City of Fresno*, 297 F.R.D. 603, 608
17 (E.D. Cal. 2014); *Global Ampersand, LLC v. Crown Eng'g & Constr.*, 261 F.R.D. 495, 502
18 (E.D. Cal. 2009).

19 To determine a reasonable hourly rate, the Court looks to hourly rates "prevailing in
20 the community for similar work performed by attorneys of comparable skill, experience,
21 and reputation." *Ingram v. Oroudjian*, 647 F.3d 925, 928 (9th Cir. 2011) (citation omitted).
22 The "relevant legal community" is generally the forum in which the district court sits. *Gates*
23 *v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992)..

24 ³ The Debtors failed to indicate the specific entries at issue, and the Court was unable to locate time
25 entries for "reviewing documents and preparing exhibits for deposition and trial" totaling \$13,091. If the
26 specific time entries are for tasks performed on 3/10/24 (\$2,065.50), 3/11/2024 (\$1,683.00), 3/14/2024
27 (\$3,748.50) and 3/18/2024 (\$5,584.50) by Magruder, the fees total \$13,081.50. However, the Court identified
several additional time entries by Magruder that reference trial and deposition preparation, resulting in
\$11,934.00 in additional fees. *See* 3/12/2024 (\$4,054.50); 3/13/2024 (\$5,967.00); and 3/15/2024 (\$1,912.50).

1 The Second Petition sets forth the timekeeper and hourly rates for the work performed,
2 ranging from \$657.00 for Noah Parson to \$1,080.00 for Gluck. Other than the rate charged
3 by Gluck, these rates are substantially similar to the current rates charged by Debtors'
4 counsel (\$620.00 for Joe Field ("Field") and Haberthur). *See* Field Jerger's and
5 Landerholm's 29th Fee Applications for Interim Compensation, ECF Nos. 1524 and 1525.
6 Although Gluck's hourly rate is higher than the norm in this forum, this does not
7 necessarily render his rate unreasonable. *See Gates*, 987 F.2d at 1405-06. The court in
8 *Gates* recognized that courts in a number of other circuits have ruled that rates, other than
9 those of the forum, may be employed for various reasons, including where a certain level of
10 experience, expertise, or specialization may be required to handle a case properly. *See, e.g.*,
11 *McDonald v. Armontrout*, 860 F.2d 1456, 1459–60 (8th Cir.1988); *Polk v. New York State*
12 *Dept. of Corr. Servs.*, 722 F.2d 23, 25 (2d Cir.1983); *Louisville Black Officers Org., Inc. v.*
13 *City of Louisville*, 700 F.2d 268, 278 (6th Cir.1983); *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d
14 760, 768–69 (7th Cir.1982), cert. denied, 461 U.S. 956 (1983).

15 As set forth in the Second Petition, Gluck is a partner at Holland & Knight LLP with
16 some 15 years of legal experience and the lead attorney in this matter. His expertise and
17 long history with this case warrant a higher hourly rate. The Court would also note that
18 Gluck performed relatively little work on this matter during the Second Petition
19 timeframe: 5 hours for total fees of \$5,400.00. The largest amount of partner time in the
20 Second Petition—55.10 hours—was spent by Garfield at the hourly rate of \$742.50, for a
21 total of \$40,911.75. The Court finds that Cerner's counsels' hourly rates are reasonable.

22 The next issue in the lodestar analysis is the whether the number of hours expended
23 by Cerner were reasonable. As stated prior, the Debtors argue that \$37,343.25 in lumped
24 entries and \$13,091.00 in deposition and trial preparation fees from the Second Petition
25 should be disallowed.

26 Lumping services in a single billing entry in a fee application is "universally
27 disapproved" by bankruptcy courts. *In re Recycling Indus., Inc.*, 243 B.R. 396, 406 (Bankr.

1 D. Colo. 2000); *In re Telcar, Inc.*, No. 00-00762-JDP, 2007 WL 1438376, at *3 (Bankr. D.
2 Idaho 2007) (citations omitted). Such block billing impedes a court’s ability to determine
3 the reasonableness of the hours spent on individual tasks and by itself has served as the
4 basis for courts to disallow fees or to issue a flat reduction of a specific percentage from an
5 award of attorney’s fees. *See, e.g., In re Charis Hosp. LLC.*, 360 B.R. 190, 200 (Bankr. M.D.
6 La. 2007). It is for this reason, that this district has a local rule requiring an itemized time
7 record of services for which any time-based award of compensation is sought. *See Local*
8 *Rules W.D. Wash. Bankr. 2016-1(a)(6).*

9 The Court has reviewed the time entries for services provided between March 8 and
10 April 10, 2024, and finds they contain sufficient information for the Court to review and
11 determine whether the time spent on the specific tasks were reasonable. Thus, the alleged
12 block billing is not a basis to reduce the requested fees as unreasonable.

13 The Debtors argue that the fees sought in the Second Petition should be reduced for
14 time spent reviewing documents and preparing exhibits for deposition and trial as these
15 are expenses that would be incurred regardless of when the documents were produced. Fed.
16 R. Civ. P. 37(b)(2)(C) allows recovery of “reasonable expenses, including attorney’s fees,
17 *caused by the failure*” of a party to obey a discovery order. Fed. R. Civ. P. 37(b)(2)(C)
18 (emphasis added). Reasonable expenses, therefore, only include those incurred because of
19 a party’s failure to comply with a court order. *See Shaw v. Ultimate Franchises*, No. 8:18-
20 02273-JLS(ADSx), 2020 WL 5539963, at *3 (C.D. Cal. Aug. 25, 2020). Here, only those
21 expenses caused by the Debtors’ failure to comply with the Order on Motions to Compel are
22 recoverable—this does not include all expenses for discovery and trial preparation that
23 would have been expended notwithstanding the late discovery production. *See Notorious*
24 *B.I.G. LLC v. Yes. Snowboards*, No. CV 19-1946-JAK (KSx), 2021 WL 6752168, at *6 (C.D.
25 Cal. Dec. 22, 2021), *report and recommendation adopted*, No. CV 19-1946-JAK (KSx), 2022
26 WL 1909548, *6 (C.D. Cal. June 3, 2022).

27

1 The Court has reviewed all the time entries comprising the Second Petition, as is its
2 duty. *See In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 841 (3rd Cir. 1994). As previously
3 indicated, the Debtors requested that \$13,091.00 in fees should be disallowed as
4 unreasonable because they relate to trial and deposition preparation that would have been
5 incurred regardless of when the documents were produced. The Court agrees that these
6 fees are unreasonable and further finds that fees for additional time entries not identified
7 by the Debtors are not warranted under Fed. R. Civ. P. 37(b)(2)(C) .

8 Taking Cerner’s counsels’ time entries at face value, there are seven entries totaling
9 \$25,015.50 that itemize time spent for “use in trial preparation,” “highlighting potential
10 trial and deposition exhibits,” “reviewing . . . for use in expert reports and to prepare for
11 trial,” “reviewing . . . preparing resulting trial and deposition exhibits,” “preparing trial
12 and deposition exhibits,” and “review . . . for use in trial and depositions.” These time
13 entries occurred between March 10 and March 18, 2024, all before the Court struck the
14 April evidentiary hearing on March 20, 2024. Sanctions ordered under Fed. R. Civ. P.
15 37(b)(2)(C) must be limited to those fees and expenses “caused by the failure” of a party to
16 obey a discovery order. Furthermore, sanctions under Fed. R. Civ. P. 37(b) must be just.
17 While the Debtors admittedly did not timely comply with the Court’s Order on Motions to
18 Compel, this does not mean that Cerner is entitled to any and all fees stemming from the
19 additionally-produced discovery. Indeed, given the descriptions, Cerner’s counsels’ time
20 entries explicitly recognize that some of the post-production fees would have been incurred
21 for deposition and trial preparation notwithstanding the late production.

22 The Court finds that the reasonable expenses and attorneys’ fees that were caused by
23 the Debtors’ failure to timely comply with the Court’s Order on Motions to Compel are
24 limited to those expenses and fees incurred in reviewing the documents to prepare for and
25 argue these motions. These do not include fees incurred preparing for depositions and trial.
26 Accordingly, Cerner’s fees requested in the Second Petition are reduced by \$25,015.50, from
27 \$139,587.75 to \$114,572.25.

1 *b. Third Petition.*

2 For the same reason fees were awarded in the Interim Order Awarding Sanctions, the
3 Court determines that Cerner is also entitled to a fee award against Debtors and Debtors'
4 counsel associated with the belated production through the May 6, 2024 hearing. It is
5 undisputed that production of the requested documents was not complete as of April 10,
6 2024. In the Interim Order Awarding Sanctions, the Court ordered the Debtors to file by
7 April 19, 2024, "the approximately 150 documents identified by the Debtors' counsel on the
8 record that were not previously produced, including any items from the cell phones,
9 WhatsApp, and email records" of Othman and Elhindi. Interim Order Awarding Sanctions
10 2:21-23, ECF No. 1364. The Court further continued the status conference on the Discovery
11 Sanctions Motions to May 6, 2024.

12 The Debtors filed a portion of the requested documents on April 19, 2024. However, due
13 to technical issues and following a further status hearing requested by the Debtors, the
14 Exhibit B records were not provided to Cerner until April 27, 2024. Cerner's Resp. 1:26,
15 ECF No. 1384.

16 Subsequent to such production, which admittedly was a large volume of material,
17 Cerner was required to expend fees to review the supplemental productions and prepare
18 further briefing for the May 6, 2024 hearing. The Court anticipated that additional
19 sanctions by Cerner would be sought and set a briefing schedule following the May 6
20 hearing for Cerner to request such additional sanctions, including costs and fees incurred
21 through May 6, 2024. Additional Briefing Order, ECF No. 1424. As with the fees incurred
22 through April 10, 2024, the fees and costs sought in the Third Petition are directly
23 attributable to the Debtors' failure to comply with the Order on Motions to Compel and are
24 authorized under Fed. R. Civ. P. 37(b)(2)(C).⁴

25 _____
26 ⁴ The Court disagrees with the Debtors that there is no basis for awarding sanctions related to records
27 obtained from Elhindi and Othman, including the WhatsApp messages, because they were never the subject
of a motion or conferral. See Debtors' Resp. 12:24-26 to 13:1-7, ECF No. 1481. As the prior Examiner found
in his report and the Court quoted in the Order on Motions to Compel, the line between documents belonging

1 As indicated above, while the Debtors and their counsel accept responsibility for the
2 belated discovery, they contend that the requested fees are not reasonable or appropriate.
3 The Third Petition sets forth hourly rates ranging from \$657 for Noah Parson to \$742.50
4 for Garfield. Gluck billed no time in the Third Petition. For the reasons set forth in the
5 Court's review of the Second Petition, the Court determines that the hourly rates in the
6 Third Petition are reasonable

7 The next issue in the lodestar analysis is the whether the number of hours expended
8 by Cerner were reasonable. The Debtors argue that \$55,165.50 in lumped entries from the
9 Third Petition should be disallowed. The Court agrees that the Third Petition, as originally
10 filed, was inadequate. However, counsel for Cerner explained at the July 18, 2024 hearing
11 that it was prepared to submit an unredacted version of the invoice for *in camera* review.
12 This offer was also set forth in the Third Petition. Third Petition 3:22-24, ECF No. 1450.
13 Following the hearing, Cerner submitted to the Court for an *in camera* review an itemized
14 list of the time entries corresponding to the fees requested in the Third Petition. Debtors'
15 counsel has not objected to these time records being submitted for *in camera* review.

16 The Court has reviewed the itemized time records for services provided between April
17 11 and May 6, 2024, and finds that they contain sufficient information for the Court to
18 review and determine whether the time spent on the specific tasks were reasonable. Unlike
19 the time records for the Second Petition, these time records do not identify any work
20 preparing for depositions or trial. Furthermore, there is nothing in the records suggesting
21 unreasonable billing such as inflated time spent or double billing. The Court, however,
22

23 to the Debtors and Belbadi is "blurred, if it exists at all." Examiner's Report 13:8-10, ECF No. 614; Order on
24 Motions to Compel 3:21-23 to 4:1-2, ECF No. 691. There is a persuasive argument that such documents were
25 covered by the Order on Motions to Compel. Cerner clearly took this position, at least in regards to the
26 WhatsApp messages, which were specifically addressed in the July 31, 2023 Deficiency Letter. Garfield Decl.
27 Ex. 4, ECF No. 1449-4. Even if such documents were not covered by the Order on Motions to Compel, and
thus rendering Fed. R. Civ. P. 37(b)(2)(C) inapplicable, fees are warranted under Fed. R. Civ. P. 37(c)(1)(A)
for failure to supplement under Fed. R. Civ. P. 26(e). It is undisputed that these documents were responsive
to Cerner's discovery request and, unlike Fed. R. Civ. P. 37(b)(2)(C), Fed. R. Civ. P. 37(c)(1) is generally "self-
executing" and "automatic." *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001).

1 disallows fees for 2.5 hours billed by Magruder on April 30, 2024, in the amount of
2 \$1,912.50. Based on the description provided, such fees were not caused by the Debtors'
3 failure to timely comply with the Order on Motions to Compel. Accordingly, Cerner's fees
4 requested in the Third Petition are reduced from \$55,165.50 to \$53,253.00. The Court
5 determines that other than the \$1,912.50, the remaining hours expended during the Third
6 Petition timeframe are reasonable.

7 c. *Debtors' failure to comply with the Order on Motions to Compel was not*
8 *substantially justified and no circumstances make an award of expenses*
9 *unjust.*

10 Notwithstanding the reasonableness of the fees, Fed. R. Civ. P. 37(b)(2)(C) further
11 provides that the Court must order the payment of expenses, "unless the failure was
12 substantially justified or other circumstances make an award of expenses unjust." The
13 burden is on the violator to show that there was a substantial justification for the violation,
14 or that circumstances would make an award unjust. *In re Pleasure Point Marina, LLC*, No.
15 CC-15-1030-FKiKu, 2015 WL 6736195, at *7 (9th Cir. BAP Nov. 3, 2015) (citing *R & R*
16 *Sails, Inc. v. Ins. Co. of Pa.*, 673 F.3d 1240, 1246 (9th Cir. 2012)); *In re Doresca*, No. 8-16-
17 75006-las, 2024 WL 1729625, at *7 (Bankr. E.D. N.Y. April 19, 2024).

18 There is nothing in the record to indicate that the failure to comply with the Court's
19 Order on Motions to Compel was substantially justified notwithstanding the fact that the
20 "Debtors and their counsel have repeatedly expressed, they are genuinely apologetic for the
21 disruptive effects of those productions." Debtors' Resp. 1:19-21, ECF No. 1481. "The court
22 is not required to find bad faith as a prerequisite to imposing monetary sanctions."
23 *Pleasure Point Marina*, 2015 WL 6736195, at *7 (citing *Bissell v. U.S.*, 321 Fed. Appx. 549,
24 552 (9th Cir. 2008)). Additionally, while the Debtors argue that they have now fully
25 complied with the Court's Order on Motions to Compel, this does not preclude the
26 imposition of sanctions. See *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002)

27

1 (recognizing that last-minute tender of documents does not cure the prejudice to
2 opponents).

3 The Court further finds that the Debtors and counsel have failed to demonstrate that
4 an award of expenses is unjust. It is true that the Debtors and counsel have incurred
5 significant fees related to the belated productions for which they will not be compensated
6 from estate funds. Although this is likely a hardship for Debtors' counsel, the impact of the
7 belated production on Cerner and this litigation cannot be downplayed. The direct
8 consequence of this production was the striking of a five-day evidentiary hearing that was
9 set to commence the following month in a case that has been pending for nearly four years,
10 further delaying any meaningful progress in these bankruptcy cases and the litigation
11 between Cerner and the Debtors. The Debtors and counsel's actions also necessitated
12 several additional hearings and further briefing by Cerner, and a significant expenditure
13 of time in reviewing the supplemental productions.

14 For the reasons set forth above, the Court finds that the Debtors' failure to comply with
15 the Order on Motions to Compel was not substantially justified, and there are no
16 circumstances that would make an award of attorney's fees and costs unjust. Thus, in
17 accordance with Fed. R. Civ. P. 37(b)(2)(C), Cerner is awarded attorney's fees in costs in
18 the amount of \$167,825.25, to be paid by the Debtors and Debtors' counsel.⁵

19 **2. Prospective Attorneys' Fees and Costs.**

20 In its Supplemental Request, Cerner seeks a prospective fee award under Fed. R. Civ.
21 P. 37(b)(2)(C) of any further fees and costs that may be incurred as a result of the Debtors'
22 discovery violations. The Court reserves ruling on this request at this time. The path going
23 forward for this bankruptcy case is still to be decided and because of developments in the
24 bankruptcy case, it is uncertain whether the evidentiary hearing on the objection to

25
26 ⁵ In the Supplemental Request, Cerner also seeks an award of fees against Debtors' management. Suppl.
27 Request 2:4, ECF No. 1448. This request is denied. This is the first time an award was sought against
management for these discovery violations and no basis for such an award has been stated.

1 Cerner's proof of claim will be rescheduled. If the evidentiary hearing is reset, Cerner can
2 resubmit a request for any fees attributable to these discovery violations.

3 **B. Additional Evidentiary Sanctions Under Fed. R. Civ. P. 37(b)(2)(A)(ii).**

4 Cerner also requests that evidentiary sanctions be entered against the Debtors under
5 Fed. R. Civ. P. 37(b)(2)(A)(ii), prohibiting the Debtors from: (a) relying on or introducing
6 any of the belatedly-produced materials; (b) presenting any testimonial or documentary
7 evidence based on such materials; and (c) from opposing Cerner's introducing or
8 characterizing any such materials, in any proceeding connected with this bankruptcy,
9 including but not limited to any hearing on Cerner's objection to the claim submitted in
10 this matter by Willamette Enterprises Ltd. ("Willamette") and Cerner's Motion to Execute
11 on the UAE Judgment. Supp. Request 2:11-17, ECF No. 1448.

12 The appropriateness of a discovery sanction is with the discretion of the court. The
13 Ninth Circuit has identified five factors a court should consider in determining the
14 appropriateness of discovery sanctions: (1) the public's interest in expeditious resolution
15 of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice; (4) the public
16 policy favoring disposition of cases on their merits; and (5) the availability of less drastic
17 sanctions. *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 814 (9th Cir. 1997) (citing *Wanderer v.*
18 *Johnston*, 910 F.2d 652, 656 (9th Cir. 1990)). Courts in the Ninth Circuit recognize that the
19 first of these two factors favor the imposition of sanctions in most cases, while the fourth
20 factor cuts against sanctions. Thus, the key factors typically are the third and fifth—
21 prejudice and availability of lesser sanctions. *Wanderer*, 910 F.2d at 656.

22 As is typical, the first two factors weigh in favor of imposing evidentiary sanctions in
23 this case. These bankruptcy cases were filed nearly four years ago and minimal progress
24 has been made toward resolution, largely because of delays caused by the Debtors' owners
25 and their shareholder. The dispute between Cerner and the Debtors, and entities related
26 to the Debtors, has a much lengthier history. The public and this Court have an interest in
27 moving these cases towards resolution. Likewise, the fourth factor, public policy in favor of

1 disposing of cases on their merits, weighs against sanctions. If the evidentiary hearing is
2 rescheduled, the general preference is to resolve this issue on its merits.

3 As recognized by the court in *Wanderer*, the key factors therefore are prejudice and the
4 availability of lesser sanctions. For the reasons set forth below, and primarily because
5 lesser sanctions are available and being utilized to address any prejudice to Cerner, the
6 Court concludes that additional evidentiary sanctions are not appropriate in this case.

7 It is undisputed that a substantial number of documents produced by the Debtors in
8 March 2024, were not previously produced. According to Simpson's declaration, a total of
9 4,922 non-duplicate documents were produced in March 2024, which number also excludes
10 any families of documents that were previously produced. Simpson Decl. 8.e., ECF No.
11 1385. Such documents also had a 96.9% hit ratio when run against the agreed upon 71
12 search terms. *Id.* at 9 and 9.b.

13 The Court has reviewed the supplemental documents in detail and agrees that they
14 include numerous responsive items that were not previously produced. Examples include
15 a June 19, 2017 (BELB0084746) email chain from Elhindi to Othman, to which is attached
16 a signed "Passive Principal Certification," dated June 1, 2016 (BELB0084747). The Court
17 disagrees with the Debtors' argument that Cerner is not prejudiced by this production
18 because it was previously provided an unsigned copy of this document. A signed versus
19 unsigned document is legally significant, particularly when the existence of a signed
20 version was denied by Othman in his July 23, 2020 deposition in the state court litigation.
21 Garfield Decl. Ex. 8, Excerpts from (Remote) Deposition of Othman, dated July 23, 2020,
22 99:6-13, 101:17-20, and 113:8-12, ECF No. 1449-8.

23 Another example is an email string between Elhindi and Haberthur dated April 17 and
24 20, 2020 (BELB0086645 and at BELB0086675) with a subject line of "RE: Responses to
25 Cerner's request for documents" discussing the \$100,000 "initial capital injection" and
26 \$9.9M loan that was allegedly converted from a loan from Belbadi to Vandevco, to a capital
27 investment, and seeking clarification as to how "this was handled internally by the

1 companies.” Cerner’s Resp. Ex. A, ECF No. 1384-7. Elhindi responds that “[t]his money
2 was taken out as a loan to Belbadi From [sic] Union National Bank. Nothing passed
3 through Willamette, which doesn’t even have a bank account.” *Id.* Such emails are
4 responsive to prior discovery requests and should have been produced.

5 Additional examples include an email string between Elhindi, Gopal Krishnan and
6 Abdul Shukkoor Thekkeyil dated April 21, 2020, regarding the audited financials for
7 Belbadi and asking whether they show an A/R from Vandevco (BELB0086644 and
8 BELB0086645); an email from Gopal Krishnan to Elhindi dated October 18, 2020,
9 regarding the debit balance in Belbadi’s books against Vandevco at the end of December
10 2019 (BELB0089761); a letter dated September 12, 2012, asking Vandevco to confirm the
11 account balance payable to Belbadi as of December 31, 2011, and signed confirmation by
12 Vandevco to Belbadi’s auditors, KPMG, of the outstanding balance payable
13 (BELB0101021); and a letter dated May 19, 2015, confirming the account balance payable
14 to Belbadi by Vandevco as of December 31, 2014 (BELB0104451). Cerner’s Resp. Ex. A,
15 ECF No. 1384-7 and 1384-8.

16 These are just a few examples of what appear to be responsive documents that were
17 not produced prior. The Court understands that document production in this case was
18 complex. However, the Debtors and counsel have failed to provide a satisfactory
19 explanation as to why such a large number of responsive documents were belatedly
20 produced. Further, Cerner did not have access to the late-filed documents prior to
21 conducting key depositions, and was forced to expend numerous hours and resources
22 reviewing the documents on a compressed schedule. As a direct result of the belated
23 production, the Court also had no choice but to strike the impending evidentiary hearing.
24 But for the availability of lesser sanctions, the prejudice to Cerner caused by the belated
25 production could be significant.

26 Despite the lack of an adequate explanation and potential prejudice to Cerner,
27 considering the remaining factor—less drastic sanctions—the Court concludes that the

1 imposition of additional evidentiary sanctions is not appropriate at this time. The Court
2 understands that all requested documents have now been produced. This is not a case
3 where a party was required to proceed to trial unprepared due to the belated production,
4 or was denied the opportunity to conduct additional discovery after a late production. While
5 the Court does not make light of the fact that the Debtors' conduct resulted in the Court
6 striking the evidentiary hearing, the delay provided Cerner with the time necessary to
7 thoroughly review the additional documents. Additionally, the Court can and will
8 reschedule the evidentiary hearing and discovery deadlines if the case developments
9 warrant it. Based on the record before it, the Court finds that any prejudice to Cerner
10 caused by the belated production is at this time remedied by the lesser sanction of awarding
11 Cerner its attorneys' fees and expenses. Any future prejudice can be remedied by allowing
12 Cerner additional time to complete discovery, if necessary, and seek supplemental fees, if
13 appropriate.

14 The Court also recognizes that the inability of Debtors' counsel to seek payment of its
15 fees from the estate related to the belated production provides further incentive for the
16 Debtors to comply with future discovery requests and orders. For all of these reasons, the
17 Court concludes that additional evidentiary sanctions under Fed. R. Civ. P. 37(b)(2)(A)(ii)
18 are not necessary or warranted.

19 // / End of Memorandum Decision // /
20
21
22
23
24
25
26
27